

FILED  
Court of Appeals  
Division II  
State of Washington  
12/21/2022 4:01 PM

No. 57011-4-II

IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON

DIVISION ONE

---

In re the Marriage of:

DAVID LEWIS SUTHERLAND,

Appellant,

and

ANNA MARIA SUTHERLAND,

Respondent.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Camara Banfield

---

OPENING BRIEF OF APPELLANT

---

**SHARON BLACKFORD PLLC**  
600 Stewart Street, Suite 400  
Seattle, Washington 98101  
sharon@washingtonappellatelaw.com  
Telephone: (206) 459-0441

## **TABLE OF CONTENTS**

I.	Introduction .....	1
II.	Assignments of Error .....	3
III.	Issues Pertaining to Assignments of Error .....	3
IV.	Statement of the Case .....	7
A.	David and Anna marry and problems ensue ..	7
B.	In March, 2021, Anna agrees to a parenting plan providing for her to stay with the children in Washington .....	7
C.	Anna serves David a Notice of Intent To Move With Children to Ohio, two months after agreeing to a parenting plan keeping the children in Washington .....	8
D.	Anna harasses David and a female friend, resulting in an order of protection.....	9
E.	Anna is found in contempt of the Final Parenting Plan .....	10
F.	At trial, David criticizes Anna's parenting .....	10
G.	David testifies that Anna withholds medical and educational information about the children from him.....	11
H.	David testifies that Anna does not make the children available for David's calls with the	

	children in a consistent fashion .....	13
I.	Scott Whitlock testifies that he has assumed responsibility for paying all of Anna’s attorney fees as well as buying her a home to live in in Ohio and providing other support ...	15
J.	The trial court rules that David is bullying and abusive, that there is no question the relocation should go forward, that David berated Anna, that David’s narrative about Anna withholding or delaying information about the children is “not even true,” that the children will relocate with Anna to Ohio, and that David must pay Anna \$29,170.04 in attorney fees, in part for unspecified intransigence .....	16
V.	ARGUMENT .....	20
A.	Introduction.....	20
B.	Standard of Review .....	22
C.	Judge Banfield abused her discretion in awarding attorney fees based in any part on intransigence .....	23
D.	If this Court determines any award of attorney fees based on intransigence is appropriate, the trial court’s complete failure to segregate the portion of the fee award that is due to intransigence requires remand.....	27

E.	There is no basis for an award of attorney fees based on need v. ability .....	29
F.	David should receive attorney fees on appeal and on remand .....	35
G.	On remand, this matter must be heard by a different judicial officer.....	36
VI.	CONCLUSION .....	40

## **TABLE OF AUTHORITIES**

### **DECISIONS OF THE WASHINGTON SUPREME COURT**

<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 957 P.2d 632 (1998) .....	22, 28-9
<i>State v. McEnroe</i> , 181 Wn.2d 375, 333 P.3d 402 (2014).....	36

### **DECISIONS OF THE WASHINGTON COURT OF APPEALS**

<i>Berryman v. Metcalf</i> , 177 Wn. App. 644, 312 P.3d 745 (2013).....	5, 28
<i>In re Custody of R.</i> , 88 Wn.App. 746, 947 P.2d 745 (1997), <i>superseded by statute</i> <i>as stated in In re Marriage of Tostado</i> , 137 Wn. App. 136, 151 P.3d 1060 (2007).....	36-7, 40
<i>In re Marriage of Bobbitt</i> , 135 Wn. App. 8, 144 P.3d 306 (2006) .....	22, 24, 34
<i>In re Marriage of Burrill</i> , 113 Wn. App. 863, 56 P.3d 993 (2002) .....	22, 28
<i>In re Marriage of C.M.C.</i> , 87 Wn.App. 84, 940 P.2d 669 (1997).....	35-6

## DECISIONS OF THE WASHINGTON COURT OF APPEALS (cont'd)

<i>In re Marriage of Crosetto</i> , 82 Wn.App. 545, 918 P.2d 954 (1996) .....	4, 27
<i>In re Marriage of Greenlee</i> , 65 Wn. App. 703, 829 P.2d 1120 (1992) .....	20-1
<i>In re Marriage of Wilson</i> , 117 Wn.App. 40, 68 P.3d 1121 (2003) .....	35
<i>In re Marriage of Wixom</i> , 190 Wn. App. 719, 360 P.3d 960 (2015) .....	3-4, 26
<i>Magana v. Hyundai Motor Am.</i> , 141 Wn.App. 495, 170 P.3d 1165 (2007), <i>rev'd on other grounds</i> , 167 Wn.2d 570 (2009) .....	36
<i>Mattson v. Mattson</i> , 95 Wn. App. 592, 976 P.2d 157 (1999) .....	21
<i>McCausland v. McCausland</i> , 129 Wn.App. 390, 118 P.3d 944 (2005), <i>reversed on other grounds</i> , 159 Wn.2d 607 (2007) .....	37
<i>Saldivar v. Momah</i> , 145 Wn. App. 365, 186 P.3d 1117, <i>reconsideration granted in part</i> , 2008 Wn. App. Lexis 2216 (2008), <i>rev. denied</i> , 165 Wn.2d 1049 (2009) .....	37
<i>Schumacher v. Watson</i> , 100 Wn. App. 208, 997 P.2d 399 (2000) .....	25

## **WASHINGTON STATE STATUTES**

RCW 26.09.140 .....	5
RCW 4.84.330 .....	35

## **WASHINGTON STATE COURT RULES**

RAP 14.2 .....	35
RAP 18.1(a) .....	35
RAP 18.2(c).....	36
RAP 18.17(b) .....	41

## **I. INTRODUCTION**

The sole issue in this relocation case is the propriety of a fee award of \$29,140.04 to Anna.<sup>1</sup> Two months after Anna and David signed an agreed final parenting plan providing that the children would reside in Washington, Anna notified David that she intended to relocate the children to Ohio. David objected. The matter went to trial, where Judge Camara Banfield found that “it wasn’t a question and so I don’t think this case should have had to go to trial,” allowing Anna to relocate with the children. 3 RP 488-89.

There were no significant discovery issues prior to trial, and while the relocation case was pending Anna was found in contempt of the residential provisions of the parenting plan and was subjected to an Order of

---

<sup>1</sup> The parents, whose names are David Sutherland and Anna Sutherland, are referred to here as “David” and “Anna” for clarity only. No disrespect is intended.



Protection preventing her from further harassing David's friend Jennifer. In her oral ruling regarding the attorney fee award to Anna, Judge Banfield stated, "[l]et me, let me say, let me be very clear, because I did already make my record at trial. It is regarding ability to pay, and it's also regarding intransigence. So there we go. I put that on the record. You got it. That meets the statute." 4 RP 503.

Judge Banfield made no effort to segregate what portion of the fee award was due to David's supposed intransigence, nor did Judge Banfield point to any specific intransigence, other than "I don't think this case should have had to go to trial."

Regarding Anna's need, she had \$64,104.04 in the bank at the time of the relocation trial, and her friends Scott and Kim Whitlock had paid for her home and for all her attorney fees up to trial and planned to pay for the remainder of her attorney fees once trial was concluded. Anna had the ability to pay for her own attorney fees

without David's help, thus need does not justify the fee award.

The fee award is inequitable because Anna forced David to endure an unnecessary relocation trial that she should have prevented by being candid about her relocation plans when she agreed to the final parenting plan only two months earlier. The attorney fee award must be reversed.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court abused its discretion in ordering David to pay Anna \$29,140.04 in attorney fees. CP 273.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. "Determining intransigence is necessarily factual, but may involve foot-dragging, obstructing, filing unnecessary or frivolous motions, refusing to cooperate with the opposing party, noncompliance with discovery requests, and any other conduct that makes the proceeding unduly difficult or costly." *In re Marriage of*

*Wixom*, 190 Wn. App. 719, 725, 360 P.3d 960 (2015).

Here, Judge Banfield pointed to no such conduct on David's part. He did not delay any proceedings, he filed no unnecessary motions, he did not obstruct discovery or act in contempt of court; he did nothing to increase the difficulty or cost of the relocation proceedings. Judge Banfield's oral remarks indicate she was unhappy that David had objected to the relocation and believed that "I don't think this case should have had to go to trial." 3 RP 488-89. Yet David's exercise of his statutory right to object to relocation cannot itself form the basis for a finding of intransigence. Must Judge Banfield's finding of intransigence be vacated as an abuse of discretion?

(Assignment of Error 1.)

2. Trial courts must segregate fees caused by intransigence from those fees incurred for other reasons.

*In re Marriage of Crosetto*, 82 Wn.App. 545, 565, 918 P.2d 954 (1996). Normally, an unsupported fee award

"will be remanded for the entry of proper findings of fact and conclusions of law that explain the basis for the award." *Berryman v. Metcalf*, 177 Wn. App. 644, 659, 312 P.3d 745 (2013). Here Judge Banfield never segregated the intransigence portion of the fee award, either orally or in writing. Should this court find an attorney fee award based on intransigence is merited, must this case be remanded for the trial court to establish findings of fact and conclusions of law on David's intransigence? (Assignment of Error 1.)

3. RCW 26.09.140 provides: [t]he court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred

prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.”

Here Judge Banfield failed to consider all of Anna’s resources, which included Scott and Kim Whitlock who had paid all Anna’s attorney fees to date, bought her a home, and committed to paying the remainder of her attorney fees through to the end of trial, as a gift to Anna. Anna had no need of David’s funds to pay her attorney fees. Further, there was no need for this relocation proceeding to take place at all, since Anna should have disclosed her plan to relocate during the dissolution proceedings, which concluded only two months before she filed for relocation. Did the trial court abuse its discretion in ordering payment of attorney fees to Anna based on need? (Assignment of Error 1.)

#### **IV. STATEMENT OF THE CASE**

##### **A. David and Anna marry and problems ensue.**

David and Anna married in 2014. CP 5. They have children Alice (6), Ben, and David Theodore (4, twins). 1 RP 14; CP 7. David, a soldier, has a degree in healthcare sciences, is part of a forward surgical detachment and is in nursing school. 1 RP 72. Anna was a stay at home mother during the marriage. CP 274. Their marriage experienced problems, with Anna texting David that she wanted to shoot David but would not do so because she would go to jail, and telling David to “suicide himself.” Exh. 1 p. 6-7; 1 RP 45. Their dissolution was entered on March 17, 2021. CP 10, 18.

**B. In March 2021, Anna agrees to a parenting plan providing for her to stay with the children in Washington.**

The final parenting David and Anna agreed to on March 17, 2021 provided for joint decisionmaking, no restrictions on either parent, and for the children to reside

primarily with Anna due to David's limited ability to obtain time off in the military. 1 RP 31; CP 19-20. The parenting plan does not mention anything regarding relocation; it provides for regular weekly exchanges of the children. CP 20-23.

C. Anna serves David a Notice of Intent To Move With Children to Ohio, two months after agreeing to a parenting plan keeping the children in Washington. On May 25, 2021, Anna served David with a Notice of Intent To Move With Children to Ohio. CP 73. In his Objection, David noted that Anna's agreement to a final parenting plan providing for the children to live in Washington only two months before serving her Notice constituted an agreement to live with the children in Washington. CP 74.

David's Objection stated that while Anna had presented the idea of her moving with the children to Ohio during the divorce negotiations, she "let the idea go

without protest.” CP 74. He explained that as a result, Anna’s reason for moving is not given in good faith. *Id.*

D. Anna harasses David and a female friend, resulting in an Order of Protection. On March 28, 2021, Anna came to David’s apartment with the kids in the car, banged on David’s door and tried to force her way into his apartment in order to confront him about his relationship with another woman. She only left when David said he would call the police. 1 RP 111. On May 4, 2021 Anna followed David and his female friend back to his apartment. 1 RP 111. She had been waiting across the street with the children in the car for the opportunity to confront David; Anna yelled accusations at David and “cussed” at him with the children present. 1 RP 112. David’s friend called the police. *Id.* David’s friend received an Order For Protection – Harassment protecting her from Anna. Exh. 9.



E. Anna is found in contempt of the Final Parenting Plan. Anna was found to be in contempt on October 8, 2021, for failing to follow the residential provisions of the parenting plan related to Labor Day weekend 2021. CP 216. Anna paid David \$500 attorneys fees. CP 217. David has never been found in contempt.

F. At trial, David criticizes Anna's parenting. David testified that Anna never reads books to the children (1 RP 30), Anna feeds them improperly, resulting in documented nutritional deficiencies (1 RP 24), she is not sufficiently watchful, resulting in David Theodore pulling a dresser down on top of himself (1 RP 19), Anna does not require the children to floss their teeth (1 RP 13, 134) and they have significant dental problems, requiring significant work on Alice's teeth (1 RP 153), the four year old twins are still sleeping in diapers (1 RP 13), the children are not good at playing independently (1 RP 15), and the boys appear to have significant developmental

issues (1 RP 129). Anna told the court that the boys do not have any special needs. 2 RP 243.

G. David testifies that Anna withholds medical and educational information about the children from him.

David explained that once the parties separated, Anna stopped keeping him regularly informed of the children's medical and educational status. Anna never informed David that the children had been enrolled at Strongsville Montessori Enrichment School; he only found out a while after they had been expelled. 1 RP 98. Anna admitted that she never listed David as a parent at Strongsville. 1 RP 221. Similarly, Anna never informed David that the boys were enrolled in Wishing Well Enrichment Center until some time after they were expelled; Anna admitted that she never had listed him as a parent at Wishing Well, nor did she notify David that they had been expelled. 1 RP 104, 221, 224. She also admitted that she has not listed David as a parent with Grace Affordable Child Care and

cannot recall if she listed David as a contact at North Royalton for Alice. 1 RP 220. Anna admitted that she has not always been timely in posting information to Our Family Wizard. 1 RP 219. David testified that the boys were expelled from one school in August and Anna did not notify David about it or put it in Our Family Wizard until February 3. 1 RP 55-6. Ben received behavioral reports from Center Park daycare but Anna did not tell David about it for 7 months. 1 RP 85.

In Ohio, the boys had appointments at Cleveland Clinic in August 2021, but David was not informed of this until after follow-up appointments had taken place in November. 1 RP 88. David was particularly frustrated by this because as a health care professional, David can contribute by asking questions Anna may not ask. *Id.* David was not made aware that the children were being psychologically evaluated until after it was too late for him to have any input. 1 RP 50.

H. David testifies that Anna does not make the children available for David's calls with the children in a consistent fashion. David explained that often during his calls with the children there are major distractions, like cousins or friends who are actively playing with the children at the time of the call, or the children are eating a meal or are in the car, or the children are fighting over the tablet. 1 RP 43. The children are usually not settled and ready for the call with him. *Id.* David wished to call the children every night but Anna was not receptive to that, so he tries to call them each weeknight. 1 RP 29-30. Since Anna does not read to them, David wanted to call them at bedtime and read to them, which seemed to him like “a home run for both of us as parents” and a continuation of their home routine in Washington. 1 RP 30. Anna does not want David to do this, saying that 8:00 pm is a bad time. 1 RP 30.

David related that communication with the children is an ongoing struggle; he buys them tablets on which to call, installs the programs, sets up usernames and passwords for the children, but Anna does not cooperate and two of the three tablets he has bought them have already been broken. 1 RP 41. David prefers not to use cell phones for the calls because in his experience the cell calls are subject to a high level of interruptions and distractions; other calls and text messages interrupt their calls, and often Anna would have the children call David while they were in the car or just sitting down to dinner and it would be very difficult for them to hear one another. 1 RP 42.

David explained that “originally” Anna did try to make an effort to sit the children on the couch together, all three of them, but that level of commitment to the calls did not continue long. 1 RP 42-3. “[I]t’s not a structured time, they’re not used to, Okay, Dad’s going to call at this

time, let's call him and sit down with Dad and talk.

There's been cousins over, there's been friends over, it has not been an environment that shows that Anna is serious about fostering the relationship with their dad." 1 RP 43.

Anna testified that she had offered David reasonable telephone and video access to the children. 1 RP 217.

I. Scott Whitlock testifies that he has assumed responsibility for paying all of Anna's attorney fees as well as buying her a home to live in in Ohio and providing other support. Scott met Anna and her brother Teo in Romania when Scott went on a trip to take Christmas presents to foster homes in Romania. 2 RP 255. Scott and his wife Kim helped Teo come to the U.S. to attend university in Indiana. *Id.* When Anna and David's dissolution began, Scott helped Anna both financially and with other things, calling himself her "case manager." 2 RP 255, 270, 291.

As of the start of trial, Scott testified that he had paid approximately \$56,000 for Anna's legal costs. 2 RP 286. He testified that he expects to pay \$80,000 in legal costs for Anna by the end of the relocation proceeding. 2 RP 287. He termed his financial assistance to Anna a "gift," agreeing that he is 100% personally invested in Anna's case. 2 RP 295.

Anna testified that at the time of trial she had cash on hand of \$64,104.04 and is living in the home that Scott bought for her. 2 RP 364.

J. The trial court rules that David is bullying and abusive, that there is no question the relocation should go forward, that David berated Anna, that David's narrative about Anna withholding or delaying information about the children is "not even true," that the children will relocate with Anna to Ohio, and that David must pay Anna \$29,170.04 in attorney fees, in part for unspecified intransigence. Near the start of Anna's testimony, Judge

Banfield stated “I’m just going to start showing my cards here that Mr. Sutherland has not been supportive of Ms. Sutherland, period. And so I don’t think that – I mean, if that’s what you’re going to, I think it’s been pretty clear that he hasn’t been very supportive of her and she doesn’t have a support system here in Vancouver because of that.” 2 RP 360-61.

Judge Banfield made extensive oral rulings. “I have a really hard time even considering joint decision making here because there’s no – there’s a complete lack of respect and there’s bullying that has been happening repeatedly throughout this case.” 3 RP 437. Judge Banfield found that Anna’s petition to relocate is in good faith because she had absolutely no support in Washington. 3 RP 438. Judge Banfield did not address David’s argument that Anna did not act in good faith because she had signed a parenting plan providing for the



children to stay in Washington only two months prior to asking to relocate to Ohio.

Judge Banfield termed the parties relationship as “so toxic” and blamed this on David. 3 Rp 441. “His disdain for Mother was very clear throughout this testimony. He blamed her for all issues regarding the children and that’s – that does not provide a feasible alternative for her to not relocate.” 3 RP 442.

Judge Banfield found that David “has expected [Anna] to spoon feed him” information about the children’s medical and educational status in Ohio. 3 RP 445. Judge Banfield characterized David’s behavior to Anna as “abusive.” 3 RP 448.

Judge Banfield stated “... you keep saying I think that this is a reprimand. It is.” 3 RP 453. “... I am acknowledging that this has been a very abusive relationship in the communications, so, yeah, I am reprimanding that, Mr. Spears, so let’s be clear.” 3 RP

453. Judge Banfield expressed worry about Anna being “dragged back and forth into court” by David. 3 RP 454.

Judge Banfield granted attorneys fees to Anna “for the amount that’s over the part that Mr. Whitlock’s paid thus far.” 3 RP 488. Judge Banfield ruled that in this relocation case, “the elements were just really clear ... it wasn’t a question and so I don’t think this case should have had to go to trial and I think that it was very – it was highly litigated, but I’m not going to make him pay for the prior litigation, but for the portion that has been unpaid. I am granting that.” 3 RP 488-89. Judge Banfield found that the cost of the trial itself “is not gifted and so I’m saying [David’s] going to have to pay that portion... so the rest from between 52 or whatever --” 3 RP 489.

At the presentation of orders David objected again to the entry of the attorney fee award to Anna. 4 RP 500. Judge Banfield responded that

[Anna] had to have extensive help, and I – and this is just a small portion of her fees that have

been paid, that your client's having to pay, because she's had a – to have other people assist her in this. You know she was berated for where she – you know, she was constantly having to be concerned about where her visits were taking place, if she was on the run with the kids. Like, every, every parenting decision she was making was questioned and she was walking on eggshells.

4 RP 502. Judge Banfield added “Let me, let me say, let me be very clear, because I did already make my record at trial. It is regarding ability to pay, and it's also regarding intransigence. So there we go. I put that on the record.

You got it. That meets the statute.” 4 RP 503.

David's appeal timely followed. CP 289.

## **V. ARGUMENT**

A. Introduction. A court may award attorney fees in a civil action if the award is authorized by statute, agreement of the parties, or a recognized equitable ground. *In re Marriage of Greenlee*, 65 Wn. App. 703, 707, 829 P.2d 1120 (1992). As an equitable remedy, “[a] trial court may consider whether additional legal fees

were caused by one party's intransigence and award attorney's fees on that basis." *Greenlee*, 65 Wn. App. at 708; *Mattson v. Mattson*, 95 Wn. App. 592, 604, 976 P.2d 157 (1999).

Parents have a statutory right to object to the proposed relocation of the parent with whom the child(ren) reside the majority of the time. See RCW 26.09.480. Exercising this right cannot by itself form the basis for a finding of intransigence. *Id.* Yet Judge Banfield explicitly punished David for exercising his right to object to the relocation and consequent upending of a parenting plan the parties had just finalized two months ago, telling him "I don't think this case should have had to go to trial" when explaining her fee award to Anna. 3 RP 488-89.

David had every right to expect Anna to abide by the parenting plan she had just agreed to. He was well within his rights to ask the court to hold her to that plan and deny relocation. While he does not appeal the relocation

itself, because he does not want to put his children through another residential change, this Court should reverse the inequitable award of attorney fees to Anna.

B. Standard of review. A party challenging an attorney fee award in a family law proceeding must demonstrate that the trial court abused its discretion. *In re Marriage of Burrill*, 113 Wn. App. 863, 873, 56 P.3d 993 (2002). An attorney fee award amounts to an abuse of discretion when the court's decision is outside the range of acceptable choices or based on untenable grounds or untenable reasons. *In re Marriage of Bobbitt*, 135 Wn. App. 8, 29-30, 144 P.3d 306 (2006).

The absence of adequate findings requires a remand to the trial court for entry of proper findings. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). Fee decisions are entrusted to the discretion of the trial court but the appellate court will exercise its supervisory role to

ensure that discretion is exercised on articulable grounds.

*Id.*

C. Judge Banfield abused her discretion in awarding attorney fees based in any part on intransigence. Judge Banfield repeatedly scolded David for exercising his right to object to the relocation (“the elements were just really clear ... it wasn’t a question and so I don’t think this case should have had to go to trial and I think that it was very – it was highly litigated, but I’m not going to make him pay for the prior litigation, but for the portion that has been unpaid. I am granting that” (3 RP 488-89)) and telling Anna’s attorney the court is “surprised you didn’t do a half-time motion.” 2 RP 413).

Yet David’s desire to hold Anna to the parenting plan she agreed to two months ago is not intransigence. To find a litigant intransigent for merely exercising a statutory right of objection is outside the range of acceptable choices and based on untenable grounds or

untenable reasons. *In re Marriage of Bobbitt*, 135 Wn. App. 8, 29-30.

Judge Banfield did not find intransigence based on any delay of the proceedings by David, or any contemptuous behavior by David (it is Anna who was found in contempt during the proceedings), or any harassing behavior (it is Anna who was found to have harassed one of David's friends). Judge Banfield did not point to any evidence David withheld, any unreasonable discovery demands by David, any unreasonable continuance requests, or any unnecessary motions filed by David that in any way prolonged the proceedings. David did not obstruct any order by any judicial officer or engage in any conduct that made the relocation proceeding unduly difficult or costly. The evidence simply does not provide any factual support for the award of attorney fees based on intransigence here.

Judge Banfield appeared to be incensed by what she perceived to be the lack of support (2 RP 360-61) that she believed David provided to Anna in Clark County, the lack of respect and bullying she believed David showed toward Anna (3 RP 437) and she blamed David for making the relationship “so toxic.” 3 RP 441. “His disdain for Mother was very clear throughout this testimony. He blamed her for all issues regarding the children and that’s – that does not provide a feasible alternative for her to not relocate.” 3 RP 442.

None of these grievances Judge Banfield held against David constitute intransigence on David’s part in the conduct of the relocation proceedings. “Intransigence is the quality or state of being uncompromising.” *Schumacher v. Watson*, 100 Wn. App. 208, 216, 997 P.2d 399 (2000) (citing WEBSTER’S THIRD NEW INTERNATIONAL



DICTIONARY 1186 (3d ed. 1993)). “Determining intransigence is necessarily factual, but may involve foot-dragging, obstructing, filing unnecessary or frivolous motions, refusing to cooperate with the opposing party, noncompliance with discovery requests, and any other conduct that makes the proceeding unduly difficult or costly.” *In re Marriage of Wixom*, 190 Wn. App. 719, 725, 360 P.3d 960 (2015). Judge Banfield points to no such conduct to justify the finding of intransigence, nor does the record evidence any intransigent conduct by David.

To the contrary, Anna’s conduct was intransigent because her failure to candidly disclose that she definitely planned to relocate during the divorce proceedings made the relocation into an entirely separate trial necessitating many tens of thousands of dollars in additional attorney fees for

each party. Judge Banfield abused her discretion in awarding attorney fees based in any part on intransigence by David.

D. If this Court determines any award of attorney fees based on intransigence is appropriate, the trial court's complete failure to segregate the portion of the fee award that is due to intransigence requires remand. Trial courts must segregate fees caused by intransigence from those fees incurred for other reasons. *In re Marriage of Crosetto*, 82 Wn.App. 545, 565, 918 P.2d 954 (1996). Yet here Judge Banfield never segregated the intransigence portion of the fee award. The closest she came was “[l]et me, let me say, let me be very clear, because I did already make my record at trial. It is regarding ability to pay, and it’s also regarding intransigence. So there we go. I put that on the record. You got it. That meets the statute.” 4 RP 503.

Unfortunately, Judge Banfield did not make a record of intransigence at trial nor did the court indicate at trial what portion of the fees is due to intransigence and what conduct constituted intransigence. Absent these findings, remand is required. While segregation is not required when the intransigence permeates the entire proceedings, *In re Marriage of Burrill*, 113 Wn. App. 863, 873, 56 P.3d 993 (2002), there is no indication that David engaged in any intransigence at all, much less intransigence that permeated the proceedings.

Normally, an unsupported fee award "will be remanded for the entry of proper findings of fact and conclusions of law that explain the basis for the award." *Berryman v. Metcalf*, 177 Wn. App. 644, 659, 312 P.3d 745 (2013). The absence of adequate findings requires a remand to the trial court for entry of proper findings. *Mahler v. Szucs*, 135

Wn.2d 398, 435, 957 P.2d 632 (1998) “Washington courts have repeatedly held that the absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record.” *Mahler*, 135 Wn.2d at 435. *Mahler* holds that “findings of fact and conclusions of law are required to establish such a record.” *Id.* Fee decisions are entrusted to the discretion of the trial court but the appellate court will exercise its supervisory role to ensure that discretion is exercised on articulable grounds. *Id.*

If this Court determines that David should pay any attorney fees due to intransigence, remand is required. As explained *infra*, any such remand must be conducted by a different judicial officer.

E. There is no basis for an award of attorney fees based on need v. ability. This relocation trial was completely unnecessary because Anna should

have candidly disclosed her intent to relocate during the divorce proceedings that concluded only two months before she notified David she intended to relocate. Anna never explained why she did not resolve the relocation issue during the dissolution proceedings. There was no “need” to conduct this relocation proceeding at all. If Anna were truly concerned about the “need” to conserve her funds, she would not have required two trials to take place when one trial would have been much more efficient.

Anna’s monthly income including support she receives from David and her job is \$3,050.72. 2 RP 363-64. She has cash on hand of \$64,104.04, largely from sale of the house from her divorce from David. 2 RP 364.

But Anna did not have any need for attorney fees from David because her attorney fees are all

being paid for her by the same people who purchased a house for her to live in in Ohio, Scott and Kim Whitlock. 1 RP 196-201; 2 RP 286-95. Scott described himself as 100% personally invested in Anna's relocation case, calling himself her "case manager". 2 RP 291, 293. Scott told the court that he had already paid \$56,000 for Anna's attorney fees in the relocation and that he expected to continue paying for the trial and to pay approximately \$80,000 by the time it finishes. 2 RP 287. Scott specifically characterized his payment of Anna's attorney fees as a "gift." 2 RP 295.

Judge Banfield erroneously found that the cost of the trial itself "is not gifted and so I'm saying [David's] going to have to pay that portion... so the rest from between 52 or whatever --" 3 RP 489.

Because Scott and Kim Whitlock stood ready, able, and willing to pay all of Anna's attorney fees,

Anna had no need of money from David. While Judge Banfield agreed that Scott and Kim Whitlock were paying Anna's attorney fees and that they are a gift to Anna she ruled that "I'm granting attorneys' fees for the amount that's over the part that Mr. Whitlock's paid thus far." 3 RP 488. "... I'm not going to make him pay for the prior litigation, but for the portion that has been unpaid. I am granting that." 3 RP 488-89.

Judge Banfield further elaborated:

I think the record from our trial basically indicated, you know, the -- you know, short of harassment by Mr. Sutherland to Ms. Sutherland, and so I think that I've been very generous here, but she had a very difficult time having to navigate this. She had to have extensive help, and I -- and this is just a small portion of her fees that have been paid, that your client's having to pay, because she's had a -- to have other people assist her in this. You know, she was berated for where she -- you know, she was constantly having to be concerned about where her visits were taking place, if she was on the run with

the kids. Like, every, every parenting decision she was making was questioned and she was walking on eggshells. I think it's reasonable. I agree. I appreciate you lodging your objection for your client, but I think it's reasonable, as I indicate in the trial.

4 RP 502-03. Anna thus had no need of attorney fees from David because she had another source of funds to pay her attorney fees; a source who testified that he was ready, willing, and able to pay for all her fees through the end of trial, as a gift. 2 RP 287, 295.

Judge Banfield's decision to award Anna attorney fees based on "need" is not based on an objective consideration of the resources available to each party. Rather, it is based on Judge Banfield's continually repeated negative impression of how David conducted his relationship with Anna. While the evidence fails to bear out Judge Banfield's negative view of David's conduct, even if that view



were accurate, it would not form the basis of an attorney fee award based on need v. ability to pay.

Even if David had in fact “berated” Anna and made her “walk[] on eggshells” and questioned her every parenting decision, that is irrelevant to the calculus of need v. ability to pay. Judge Banfield identifies no basis for her finding of need other than her dislike of David’s conduct.

An attorney fee award amounts to an abuse of discretion when the court’s decision is outside the range of acceptable choices or based on untenable grounds or untenable reasons. *In re Marriage of Bobbitt*, 135 Wn. App. 8, 29-30, 144 P.3d 306 (2006). To the extent that Judge Banfield’s attorney fee award was based on need, it is an abuse of discretion because it is based on untenable grounds (Anna had another source for the funds that would not negatively impact her income or savings) and

untenable reasons (Judge Banfield's dislike of David's conduct). The fee award must be vacated.

F. David should receive attorney fees on appeal and on remand. Pursuant to RAP 14.2, should David prevail in this appeal, he should be awarded his costs of preparing the record. *See* RCW 4.84.330. RAP 18.1(a) provides that a party is entitled to a fee award on appeal if allowed by applicable law. RCW 26.09.140 permits this court to award David attorney fees. *In re Marriage of Wilson*, 117 Wn.App. 40, 51, 68 P.3d 1121 (2003).

This court has the discretion to order a party to pay the other party's attorney fees and costs associated with the appeal of an action arising out of RCW 26.09. RCW 26.09.140. "In exercising our discretion, we consider the arguable merit of the issues on appeal and the parties' financial resources." *In re Marriage of C.M.C.*, 87 Wn.App.

84, 89, 940 P.2d 669 (1997). David will file an affidavit of need as required by RAP 18.2(c).

G. On remand, this matter must be heard by a different judicial officer. Litigants are entitled to a judge who appears to be and is impartial. *Magana v. Hyundai Motor Am.*, 141 Wn.App. 495, 523, 170 P.3d 1165 (2007), *rev'd on other grounds*, 167 Wn.2d 570 (2009). Reassignment is appropriate when “the trial judge will exercise discretion on remand regarding the very issue that triggered the appeal and has already been exposed to prohibited information, expressed an opinion as to the merits, or otherwise prejudged the issue.” *State v. McEnroe*, 181 Wn.2d 375, 387, 333 P.3d 402 (2014).

Where a trial court judge appears to have difficulty setting aside a previously expressed opinion, the appellate court will appoint a new judge to preserve the appearance of fairness. *See In*

*re Custody of R.*, 88 Wn.App. 746, 762, 947 P.2d 745 (1997), *superseded by statute as stated in In re Marriage of Tostado*, 137 Wn. App. 136, 151 P.3d 1060 (2007).

In *Saldivar v. Momah*, 145 Wn. App. 365, 186 P.3d 1117, *reconsideration granted in part*, 2008 Wn. App. Lexis 2216 (2008), *rev. denied*, 165 Wn.2d 1049 (2009), the appellate court remanded to a different judge because the trial judge's statements—impugning certain witnesses' credibility—suggested that she would have a hard time setting aside previously expressed opinions. And in *McCausland v. McCausland*, 129 Wn.App. 390, 417, 118 P.3d 944 (2005), *reversed on other grounds*, 159 Wn.2d 607 (2007), the appellate court remanded to a different judge where the trial judge failed to strictly follow the mandate on remand.

In this case, given (1) Judge Banfield's repeated and highly charged statements indicating her very strong desire to "reprimand" David, (2) Judge Banfield's characterization of the case – in which Anna's poor behavior earned her a Protection Order and a contempt finding against her during the relocation proceedings - as one where David has shown Anna a "complete lack of respect and ... bullying ..." (3 RP 437) and (3) Judge Banfield's openly stated desire to punish David for his objection to Anna's relocation two months after she agreed to a parenting plan which would keep the children in Washington State, it would be difficult or impossible for Judge Banfield to set aside her strongly held opinions.

Further, Judge Banfield developed and repeatedly stated a strongly held negative opinion that David "expected Anna to spoon feed" him

information about the children that is completely unsupported by and contradicted by the facts. 3 RP 445, 447.

In addition, Judge Banfield made it clear that she viewed any subsequent occasion on which she might sit on this case as a further opportunity to “reprimand” David. “Well, Mr. Spears, I would be happy to the [sic] person that this case comes in front of every single time, because I completely disagree with you.” 2 RP 419.

“He dictated what device the contact could,[sic] where she had to be for the contact, who could be inside the home during the contact, and I watched it from all the motions that have come in front of me and so I disagree.” 2 RP 419. “I don’t think this case should be coming back into court, but I will definitely keep it on my docket if it does,

because I – that’s just the way that I feel about it.” 2  
RP 422.

While considerations of judicial economy might make remand to Judge Banfield an economical option, “justice must satisfy the appearance of impartiality.” *In re Custody of R.*, 88 Wn. App. at 762. On remand, a different judicial officer must review the transcript and resolve the attorney fee issue in this case.

## **VI. CONCLUSION**

For the foregoing reasons, the award of attorney fees in this case must be vacated. If remand is required for any reason, a different judicial officer must be assigned.

*I certify that this pleading is in 14 point Georgia font and contains 6,209 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).*

DATED this 22<sup>nd</sup> day of December, 2022.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "S. Blackford", written over a horizontal line.

Sharon J. Blackford, WSBA 25331  
Attorney for Appellant  
David Lewis Sutherland



## **CERTIFICATION OF SERVICE**

I, Peter Chadwick, certify that on the 22<sup>nd</sup> day of December, 2022, I caused a true and correct copy of **Opening Brief of Appellant** to be served on:

served on:

Lisa E. Martin  
McKean Smith, LLC  
655 W Columbia Way Ste 504  
Vancouver, WA 98660-3614  
[lisa@mckeansmithlaw.com](mailto:lisa@mckeansmithlaw.com)

Valerie A. Villacin  
Catherine Wright Smith  
Smith Goodfriend PS  
1619 8<sup>th</sup> Ave. N.  
Seattle, WA 98109-3007  
[valerie@washingtonappeals.com](mailto:valerie@washingtonappeals.com)  
[cate@washingtonappeals.com](mailto:cate@washingtonappeals.com)

*VIA the Court of Appeals eFiling Portal*

I certify and declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED in Shoreline, Washington, this 22<sup>nd</sup> day of  
December, 2022.

A handwritten signature in cursive script, appearing to read "Peter Chadwick", written in dark ink.

---

Peter Chadwick  
Legal Assistant  
Sharon Blackford PLLC

# SHARON BLACKFORD PLLC

December 21, 2022 - 4:01 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 57011-4  
**Appellate Court Case Title:** David Sutherland, Appellant v. Anna Maria Sutherland, Respondent  
**Superior Court Case Number:** 20-3-00601-4

### The following documents have been uploaded:

- 570114\_Briefs\_20221221160056D2111146\_0928.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was SUTHERLAND OPENING BRIEF.pdf*

### A copy of the uploaded files will be sent to:

- andrienne@washingtonappeals.com
- cate@washingtonappeals.com
- lisa@mckeansmithlaw.com
- valerie@washingtonappeals.com

### Comments:

---

Sender Name: Sharon Blackford - Email: sharon@washingtonappellatelaw.com  
Address:  
600 STEWART ST STE 400  
SEATTLE, WA, 98101-1217  
Phone: 206-459-0441

**Note: The Filing Id is 20221221160056D2111146**